MIR Valve Sdn Bhd v TH Heavy Engineering Bhd and other cases

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-139–11 OF 2016, WA-24C-143–11 OF 2016 AND WA-24C-144–11 OF 2016
LEE SWEE SENG J
2 MAY 2017

Building and Construction Law — Construction contracts — Adjudication of payment disputes — Claimant made application to enforce adjudication decision pursuant to s 28 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Respondent made applications to set aside decision of adjudicator — Whether adjudicators lacked jurisdiction to hear payment claims — Whether work done by claimant was construction work within meaning of 'construction contract' under the CIPAA

This matter was primarily to enforce two separate adjudication claims between MIR Valve Sdn Bhd ('the claimant') and TH Heavy Engineering Bhd ('the respondent') pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). Both the adjudication claims were decided by two separate adjudicators in favour of the claimant. No payment response was filed by the respondent in reply to the adjudication claims with the result that the respondent was deemed to have disputed the claimant's claim under s 6(4) of the CIPAA. The respondent also raised the issue that the adjudicators lack the jurisdiction to hear the payment claim as the contract was not a construction contract. As such, the respondent then filed two of the originating summons to set aside both the decisions pursuant to ss 15(1)(b) and 15(1)(d) of the CIPAA on the ground that both adjudicators had acted in excess of their jurisdiction. By consent, both originating summons were heard together with this matter. The issues posed to the learned judge was whether the work done by the claimant to convert a ship to a floating, production, storage and offloading ('FPSO') vessel was a construction work and hence the contract for the procurement of valves fell within the meaning of 'construction contract' under the CIPAA.

Held, allowing the claimant's application and dismissing the respondent's applications:

(1) To come within a 'construction contract' under the CIPAA, the contract must either fall within the meaning of construction work or, as in this case, the procurement of equipment for construction work. Under the CIPAA, 'construction work' covers any gas, oil and petrochemical work.

Implicit in such a definition is that if the structure is more of a ship or a vessel, if it nevertheless is work done for the gas, oil and petrochemical industry, then it would still qualify to be construction work being any gas, oil and petrochemical work (see paras 22–23).

(2) One could immediately appreciate that the conversion of the ship to a FPSO vessel was such that the ship no longer served the purpose of a ship but was transformed into a different purpose — that of the oil and gas industry. This was where one must of necessity look at the functional purpose served by the conversion works and not the form of the structure with respect to its type of structure (see para 25).

(3) The place where a FPSO vessel was prefabricated was not important as in whether it be in a shipyard or a steelyard. What was important was the purpose for which the FPSO vessel was put to use. If it was designed for the shipping industry then it did not fall within the CIPAA but here, as it was being converted, modified, altered and designed for the oil and gas industry, then it fell neatly and nicely under 'construction work' being defined as such work done in any 'gas, oil and petrochemical work' (see para 75).

[Bahasa Malaysia summary

Tindakan ini adalah untuk menguatkuasakan dua tuntutan adjudikasi berasingan antara MIR Valve Sdn Bhd ('penuntut') dan TH Heavy Engineering Bhd ('responden') berdasarkan Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'). Kedua-dua tuntutan adjudikasi tersebut telah diputuskan oleh dua adjudikator yang berbeza yang memihak kepada penuntut. Tiada respon bayaran difailkan oleh responden sebagai balasan kepada tuntutan adjudikasi tersebut dengan akibat responden dianggap telah mempertikaikan tuntutan penuntut di bawah s 6(4) APAIP. Responden juga menghujahkan isu bahawa adjudikator-adjudikator tidak mempunyai bidang kuasa untuk mendengar tuntutan pembayaran kerana kontrak itu bukan suatu kontrak pembinaan. Oleh itu, responden memfailkan dua saman pemula untuk mengenepikan kedua-dua tuntutan penghakiman tersebut menurut ss 15(1)(b) dan 15(1)(d) APAIP atas alasan kedua-dua adjudikator telah bertindak melebihi bidang kuasa mereka. Dengan persetujuan kedua-dua pihak, kedua-dua saman pemula telah didengar bersama dengan tindakan ini. Isu-isu yang ditimbulkan di hadapan hakim yang bijaksana adalah sama ada kerja yang dilakukan oleh penuntut untuk menukarkan kapal kepada kapal floating, production, storage and offloading ('FPSO') adalah kerja pembinaan maka kontrak bagi perolehan injap terangkum dalam definisi 'kontrak pembinaan' di bawah APAIP.

Diputuskan, membenarkan permohonan penuntut dan membatalkan permohonan responden:

(1) Untuk terangkum di dalam definisi 'kontrak pembinaan' seperti diperuntukkan di bawah APAIP, kontrak tersebut mesti sama ada jatuh dalam maksud kerja pembinaan atau, seperti dalam kes ini, perolehan peralatan untuk kerja pembinaan. Di bawah APAIP, 'kerja pembinaan' merangkumi apa-apa kerja gas, minyak dan petrokimia. Tersirat dalam definisi sedemikian ialah jika struktur tersebut adalah lebih kepada sebuah kapal, tetapi sekiranya ia dilakukan untuk industri gas, minyak dan petrokimia, maka ia masih layak untuk difahamkan ia adalah kerja pembinaan untuk kerja gas, minyak dan petrokimia (lihat perenggan 22–23).

(2) Seorang dapat menghargai bahawa penukaran kapal ke kapal FPSO adalah seperti kapal tersebut tidak lagi berfungsi untuk tujuan sebuah kapal tetapi kini berubah menjadi tujuan yang berlainan — industri minyak dan gas. Di sinilah seorang mesti melihat tujuan fungsi kerja-kerja penukaran tersebut dan bukannya bentuk struktur berkenaan dengan jenis strukturnya (lihat perenggan 25).

(3) Tempat di mana kapal FPSO telah siap dipasang adalah tidak penting sama ada ia berada di limbungan kapal atau steelyard. Apa yang penting adalah tujuan kapal FPSO digunakan. Jika ia direka untuk industri perkapalan maka ia tidak termasuk dalam CIPAA tetapi di sini, kerana ia telah ditukar, diubahsuai, diubah dan direka untuk industri minyak dan gas, maka ia jatuh dengan kemas dan baik di bawah 'kerja pembinaan' yang ditakrifkan sebagai kerja sedemikian yang dilakukan dalam mana-mana 'kerja gas, minyak dan petrokimia' (lihat perenggan 75).]

Notes

For cases on adjudication of payment disputes, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4227–4230.

Cases referred to

NGV Tech Sdn Bhd & Anor v Kerajaan Malaysia [2016] MLJU 439, HC (refd)

Legislation referred to

Building and Construction Industry Security of Payment Act (Chapter 30B) [SG]
Building and Construction Industry Security of Payment Act 1997 [AU] s 5(2)
Construction Contracts Act 2002 [NZ] s 6(2)
Construction Industry Development Board Act 1994
Construction Industry Payment and Adjudication Act 2012 ss 2, 3, 4, 6(4), 15, 15(1)(b), (1)(d), 27(3), 28
Factories and Machinery Act 1967 s 3
Housing Grants, Construction and Regeneration Act 1996 [UK] s 105(2)(a)
Interpretation Acts 1948 and 1967 s 17A

A Petroleum Development Act 1974 s 10

Faisal Moideen (Nereen Kaur Veriah with him) (Moideen & Max) in Originating Summons No WA-24C-139–11 of 2016 for the plaintiff.
Wong Guo Bin (John Kan with him) (Izral Partnership) in Originating Summons
B *Nos WA-24C-143–11 of 2016 and WA-24C-144–11 of 2016 for the plaintiff.*
Faisal Moideen (Nereen Kaur Veriah with him) (Moideen & Max) in Originating Summons Nos WA-24C-143–11 of 2016 and WA-24C-144–11 of 2016 for the defendant.
Wong Guo Bin (John Kan with him) (Izral Partnership) in Originating Summons
C *No WA-24C-139–11 of 2016 for the defendant.*

Lee Swee Seng J:

D **[1]** These applications that are before the court raise an interesting issue with respect to whether works done on a ship to convert it into a floating production storage and offloading ('FPSO') vessel is construction work within the meaning of 'construction contract' under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). Like most ships, she had a fanciful
E name: Nordic Laurita or Deep Producer 1.

[2] The answer to that would determine whether the claimant's claim in the adjudication involving the provision to supply complete package of actuated shutdown valve ('the valves') for the Layang FPSO project ('the project') is one
F falling within CIPAA. Layang is off the coast of Sarawak and the supply of the valves to the project was in Perak.

[3] It is not in dispute that the project is a FPSO vessel conversion project. MIR Valve Sdn Bhd ('MIR'), was appointed by TH Heavy Engineering Bhd
G ('TH') to supply the valves which will be installed and would form a part of the vessel. It was also agreed by the parties that the supply and installation of the valves onto the FPSO is to fit it for the production and processing of gas condensate and crude oil.

H **[4]** There are three applications before the court by way of originating summons ('OS'). In OS WA-24C-139–11 of 2016 the plaintiff there is MIR who is the successful claimant in the adjudication. They have applied to enforce the decision of the adjudicator.

I **[5]** The other two applications are OS WA-24C-143–11 of 2016 and OS WA-24C-144–11 of 2016 where TH have applied to set aside two related adjudication decisions involving the supply of valves by MIR to them for the same project.

[6] By consent the three applications were heard together. For the avoidance of confusion the parties shall be referred to by their designations as claimant and respondent as in the adjudication or as MIR and TH respectively.

PROCEEDINGS IN THE ADJUDICATION

[7] The dispute between the two parties relates to two disputes both arising from a purchase order dated 17 December 2015. The contract sum for the supply of the valves was USD1,017,513 ('the purchase sum').

[8] On 2 February 2016, a variation to the value of USD139,432 was ordered by way of variation order No H100000315-VO1-1. This had the effect of revising the sum upwards to USD1,156,945 ('the revised purchase sum').

[9] The claimant submitted to the respondent a total of three tax invoices for the sum of USD752,014.25 (excluding GST) for work done carried out since 2 March 2016. The details of the three tax invoices are set out below:

(a) CD201500199B for USD347,083.50;

(b) CD201500199C for USD289,236.25; and

(c) CD201500199D for USD115,694.50.

[10] The respondent failed to honour the three tax invoices resulting in a payment dispute between them. The claimant served a payment claim on the respondent and subsequently followed through with the service of an adjudication claim on or about 12 July 2016 on the respondent pursuant to CIPAA. On 4 November 2016, the adjudicator, Mr Krishna Raj T Rajagopal, gave decision in favour of the claimant.

[11] The claimant also submitted two tax invoices for the sum of USD404,930.75 (excluding GST) for work carried out since 2 March 2016. The details of those tax invoices are as follows:

(a) CD201500199A for USD115,694.50; and

(b) CD201500199 for USD289,236.25.

[12] The respondent failed once again to honour the two tax invoices resulting in a payment dispute. The claimant proceeded with adjudication under CIPAA and on 17 October 2016, the adjudicator, Mr Chen Mian Kuang, gave the decision in favour of the claimant. This decision was duly registered on 22 November 2016 under s 28 of the CIPAA as a judgment of the court in an enforcement application filed.

[13] In both adjudications, no payment response was filed by the respondent with the result that the respondent is deemed to have disputed the claimant's claim under s 6(4) of the CIPAA. The respondent did however raise the issue of a lack of jurisdiction on the part of the adjudicators to hear the payment claim as the contract in question, it was submitted, is not a construction contract.

[14] Under s 27(3) of the CIPAA, when a jurisdictional issue is raised the adjudicator is permitted to proceed to hearing the dispute and deliver his decision. Section 27(3) reads:

> Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

[15] The respondent has now applied under the two applications to set aside both the decisions under s 15(1)(b) and (1)(d) of the CIPAA on ground chiefly that both the adjudicators had acted in excess of their jurisdiction when they found in favour of the claimant and/or that the respondent had been denied natural justice when the adjudicators proceeded to hear the dispute and deliver the adjudication decisions.

[16] The ground of breach of natural justice can immediately be dismissed as the express language of s 27(3) of the CIPAA clearly allows the adjudicator to proceed to hear and complete the adjudication including delivering his decision without prejudice to the rights of the party affected to apply to set it aside. I shall thus focus on the jurisdiction issue which is the main plank of the respondent's submission before this court.

PRINCIPLES

[17] The very limited grounds for setting aside an adjudication decision are as provided for under s 15 of the CIPAA which reads as follows:

> 15 Improperly Procured Adjudication Decision
>
> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) The adjudication decision was improperly procured through fraud or bribery;
>
> (b) There has been a *denial of natural justice*;
>
> (c) The adjudicator has not acted independently or impartially; or
>
> (d) The adjudicator has *acted in excess of his jurisdiction*. (Emphasis added.)

[18] In a case involving an adjudicator's core jurisdiction as in the types of

construction contracts to which CIPAA applies under s 2 or that which CIPAA excludes as in s 3, then if an adjudicator assumes jurisdiction to hear a dispute arising out of such a contract, he would then be said to have exceeded his jurisdiction since he has no jurisdiction to begin with. Therefore if an adjudicator misinterpret his jurisdiction with respect to assuming jurisdiction when there is none, then this court would be constrained under s 15(1)(d) of the CIPAA to set aside the whole of the adjudication decision.

WHETHER THE CONVERSION WORK FROM A SHIP TO THE FPSO VESSEL IS CONSTRUCTION WORK AND HENCE THE CONTRACT FOR THE PROCUREMENT OF VALVES FOR THAT WORK

[19] Under s 2 of the CIPAA, it is provided that the Act applies to every *construction contract* made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the government.

[20] A 'construction contract' is further defined in s 4 to mean a construction work contract or construction consultancy contract.

[21] What then is 'construction work'? The meaning is a technical and legal one, seeing that the Act has seen it fit to define it. It is thus not the meaning that would ordinarily be given to the expression 'construction work' for then the scope would be as wide and as varied as one can possibly give to it. Section 4 of the CIPAA defines it as follows:

> 'construction work' means the *construction*, extension, *installation*, *repair*, maintenance, renewal, removal, renovation, *alteration*, dismantling, or demolition of:
>
> (a) Any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) Any road, harbour works, railway, cableway, canal or aerodrome;
>
> (c) Any drainage, irrigation or river control work;
>
> (d) *Any* electrical, mechanical, water, *gas, oil, petrochemical or telecommunication work*; or
>
> (e) Any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work, and includes —
>
> (a) Any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and

A (b) *Procurement of* construction materials, *equipment* or workers, as necessarily required for any works described in paragraphs (a) to (e). (Emphasis added.)

B **[22]** To come within a 'construction contract' to which CIPAA applies, the contract between the claimant and respondent must either fall within the meaning of construction work or as in this case the procurement of equipment for construction work.

C **[23]** Under our CIPAA, unlike that of other jurisdictions, 'construction work' under (d) cover any gas, oil and petrochemical work. As can be seen, it is the nature of the work rather than what is being constructed that is more determinative when it comes to gas, oil and petrochemical. It is the purpose served by the structure built that is important rather than the structure built. Implicit in such a definition is that if the structure is more of a ship or vessel, if
D it nevertheless is work done for the gas, oil and petrochemical industry, then it would still qualify to be construction work being any gas, oil and petrochemical work.

E **[24]** Once it is established that the conversion work from a ship to a FPSO vessel is construction work then the contract for the procurement of an equipment such as valves for the FPSO vessel would qualify to be a 'construction contract'.

F **[25]** One can immediately appreciate that the conversion of the ship to a FPSO vessel is such that the ship no longer serves the purpose of a ship but is now transformed into a different purpose; that of the oil and gas industry. This is where one must of necessity look at the functional purpose served by the conversion works and not the form of the structure with respect to its type of
G structure.

[26] With the conversion, it no longer serves the purpose of a ship in transporting people or goods from one place to another. Its predominant purpose is that of serving the gas, oil and petrochemical industry with respect
H to drilling for oil, gas and petrochemical, processing it, storing and offloading it. In short it is now functioning like a refinery. True, it can still be moved from one place to another in exploring for gas, oil and petrochemical but no longer in the sense of transporting people or goods from one place to another.

I **[27]** Its total character and purpose have been transformed such that though it bears the shape and structure of its former form, its function is now fitted for the oil, gas and petrochemical work. Its focus is forged with the fundamental change and alteration in what it can now do which previously it could not. It is now no longer a ship, but converted now into an oil rig cum refinery.

[28] The Wikipedia, accessed on 18 January 2017 defines and explains a FPSO unit as 'a floating vessel used by the offshore oil and gas industry for production and processing of hydrocarbons, and for the storage of oil. A FPSO vessel is designed to receive hydrocarbons produced by itself or from nearby platforms or subsea template, process them, and store oil until it can be offloaded onto a tanker or, less frequently, transported through a pipeline. FPSOs are preferred in frontier offshore regions as they are easy to install, and do not require a local pipeline infrastructure to export oil. FPSOs can be a conversion of an oil tanker or can be a vessel built specially for the application ...'.

[29] It is an agreed fact that what was being procured and supplied in the valves, is peculiarly necessary for it to serve the gas, oil and petrochemical activities. It was installed onto the converted ship; converted it into a FPSO vessel. The valves function as a connector of the pipes within which gasses and crude oil are extracted and funneled to the FPSO vessel.

[30] Like all definitions, one must look at pre-existing definition before any modification was done to it to discern what Parliament might have in mind with the modification introduced.

[31] Under the Petroleum Development Act 1974 there is already a definition for 'petroleum' in s 10 which is defined as follows:

> 10 DEFINITION.
>
> For the Purpose of this Act, the expression 'petroleum' means any *mineral oil* or *relative hydrocarbon* and *natural gas* existing in its natural condition and casinghead petroleum spirit including bituminous shales and other stratified deposits from which oil can be extracted. (Emphasis added.)

[32] Really then, oil, referred to as mineral oil which has to do with exploration and exploitation of it and petrochemical referred to as relative hydrocarbon and gas referred to as natural gas are all inter-related and coming within the rough rubric of petroleum or what in industry parlance is called the 'oil and gas industry'.

[33] Then we have the definition of 'construction works' under a prior statute in the Construction Industry Development Board Act 1994 ('the CIDB Act') which is word for word identical to that of CIPAA except for the missing word 'oil' between 'gas' and 'petrochemical'.

[34] It is only too obvious that the definition of 'construction work' has been taken from or to use a perforation term, 'cut and paste' from the CIDB Act. That is not uncommon if an existing definition serves fine for another statute.

[35] If one were to trace back earlier, there was already the definition for 'work of engineering construction' in s 3 of the Factories and Machinery Act 1967 as follows:

> 'work of engineering construction' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of —
>
> (a) any erection, edifice, structure, caisson, mast, tower, pylon, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road works, dock, harbour works, railway, siding, cableway, tramway line, inland navigation, air field or aerodrome;
>
> (c) any drainage, sewer, sewage works, irrigation, river control works, sea defence work or earth retaining structure;
>
> (d) any electrical, mechanical, water, gas, petrochemical or telecommunication works; or
>
> (e) any bridge, viaduct, dam, reservoir, lagoon, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works,
>
> and includes —
>
> (aa) any formwork, falsework, scaffold or any works which form an integral part of, or are preparatory to or temporary to, the works described in paragraphs (a) to (e);
>
> (bb) site clearance, soil investigation and improvement, earth- moving, excavation, laying of foundation, site restoration and landscaping; and
>
> (cc) such other works as may be specified by the Minister.

[36] One cannot escape the similarities. Interestingly, 'premises' is defined in s 3 to include any building, place, or *floating structure*.

[37] If the site where the construction work is carried out is so important as in it must be affixed to the ground, then one would have thought that under s 2 of the CIPAA the bracketed words (at the site) would have been included as in:

> This Act applies to every construction contract made in writing relating to construction work carried out [at the site] wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

[38] Even if it had been included, the definition of 'site' in s 4 is as follows:

> 'site' means the place where the construction work is *affixed whether on-shore or off-shore*; (Emphasis added.)

[39] Therefore even though the valves are installed on a converted ship that is now a FPSO structure that floats, that is nevertheless 'off-shore' as there is no requirement that the site must be affixed on the 'seabed'.

[40] It is true that 'site' is used with respect to site clearance and site restoration in s 4 of the definition of 'construction work' and in that context, it has reference to land which of course is on-shore as is discernible from the context in which it was used as follows:

> any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including *site* clearance, soil investigation and improvement, earth- moving, excavation, laying of foundation, *site* restoration and landscaping.

[41] Be that as it may, one must give meaning nevertheless to the word 'off-shore' for as they say, it was not placed there for decorative purpose only! It is placed there purposefully to include gas, oil and petrochemical works done on a FPSO whether it be floating as in semi-submersible rig or in a floating platform or in a jack-up platform. In some of these structures, they are kept in place over the designated place of exploration and drilling by anchors on the seabed.

[42] Learned counsel for the respondent was prepared to make a distinction between a FPSO that is affixed to the seabed as qualifying to be affixed off-shore and hence not a chattel but would qualify to be construction work which must have some degree of affixation to the site. However that must be differentiated from floating FPSO and semi- submersible rigs or platforms or vessels which he said are chattels.

[43] Surely such a fine distinction would do the 'oil and gas industry' no good for in the case of a jack-up rig, as pointed out by the claimant's learned counsel, initially it is affixed on the seabed and later jack-up! The degree of affixation is of no relevance but what is relevant is whether the work done on it is 'construction work' done in relation to the 'oil and gas' industry.

[44] From the drift and definition in the drafting, it is inescapable that the CIDB has jurisdiction over those working as contractors in any works in the gas, oil and petrochemical industry. The CIDB Act provides for registration of contractors defined as 'a person who undertakes to carry out and complete any construction works' and any person not registered or holding a valid certificate of registration issued by the CIDB shall not undertake and is expressly prohibited from carrying out and completing any 'construction works'.

[45] Learned counsel for the respondent rightly pointed out that as to what type of contractors are required to register with CIDB, CIDB has issued a

'Contractor Registration Requirements and Procedures Handbook' where the contractor registration categories are divided into three distinct categories namely, civil engineering construction, construction of buildings and mechanical and electrical with the guide as to which category to register for set out in Annex 4 and specialization under Annex 5.

[46] However learned counsel was at pains to point out that from Annex 4 and Annex 5, it can be seen that ship building or ship builders is not under any of the categories of contractors required to be registered with CIDB in order to carry out 'construction works' as defined under the CIDB (Amendment) Act 2011.

[47] While that may be true, in Annex 5 it is provided under 'Registration of Contractor Specialization' the following under category and grade in the Contractor Registration Certificate at pp 66–76 of the Handbook: CE09 Oil or gas main pipeline, M13 offshore drilling structure, B20 internal gas piping system, CE15 oil and gas rig. At category M14 Pollution control system, the works is described as 'construction, maintenance and repair of offshore drilling structure, including drilling rig. One cannot escape the fact that registration of contractors is required under CIDB Act for 'gas, oil and petrochemical' works in a FPSO vessel.

[48] The reason is obvious. Whilst ship building is excluded from the definition of 'construction work' under CIPAA, where the nature of work is concerned, be they electrical, mechanical, water, gas, oil, petrochemical or telecommunication, they are nevertheless covered under CIPAA and the contractors are required to be registered under CIDB Act before executing the said 'construction works'.

[49] For instance if electrical and mechanical works were done on a satellite that is later launched into space for telecommunication works, would that not be covered under (d) of the definition of 'construction work'? I would think it is covered because it covers any telecommunication works done as well as electrical and mechanical works done.

[50] The addition of 'oil' to the already existing definition of 'construction work' in CIPAA is clearly to erase any doubt as to whether 'oil' exploration and exploitation activities, be they upstream or downstream are covered under CIPAA. The rationale is not difficult to find. The 'oil and gas' industry is the major contributor of economic growth in our country. If those who are involved in it are excluded from the speedy resolution mechanism of statutory adjudication under CIPAA for work done or services rendered, they would be greatly affected to the detriment of the industry and even economy, as a whole.

[51] Little wonder that whilst other countries have excluded 'oil and gas' works in their scheme of statutory adjudication, we have expressly included it and for good reason. A

[52] The United Kingdom excludes it under s 105(2)(a) of their Housing Grants, Construction and Regeneration Act 1996 as follows: B

> The following operations are not construction operations within the meaning of this Part — (a) Drilling for, extraction of, oil or natural gas; ...

[53] There are similar provision in the New South Wales Building and Construction Industry Security of Payment Act 1997 in s 5(2). In New Zealand under its Construction Contracts Act 2002 it is similarly excluded under s 6(2). There is no express exclusion of oil and gas work under the Singapore Building and Construction Industry Security of Payment Act (Chapter 30B). C D

[54] I bear in mind the salutary principle of interpretation of statute as contained in s 17A of the Interpretation Acts 1948 and 1967 which provides that 'In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object'. E

[55] The purpose or object of the CIPAA is captured in its preamble as follows: F

> An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the *construction industry* and to provide for connected and incidental matters. (Emphasis added.) G

[56] The meaning of 'construction industry' must of necessity be based on the types of 'construction work' as defined in the CIPAA.

H

[57] Learned counsel for the respondent was concerned that Adjudicators appointed under the CIPAA would be unnecessarily burdened in dealing with claims not within the construction industry thereby slowing down the entire payment adjudication process. I think that is beside the point. If a claim falls under the CIPAA then it is for KLRCA to train enough adjudicators to expeditiously decide on all disputes falling under it. I

[58] Likewise the fear expressed by learned counsel that injustice may also occur in the form of denial of natural justice or rough justice as in having to

A deal with far too many claims from beyond the construction industry, and that adjudicators may not have the time to allow for a proper hearing and taking of evidence, is with respect, misplaced.

B **[59]** The cure for bottleneck arising out of proper application is not to exclude or constrict application, but to clear the bottleneck with more properly-trained adjudicators. To exclude players in the oil and gas industry which is the main contributor to our economic growth would do a great disservice to all in that key industry.

C

[60] Whilst I do not for a moment doubt that the works described to be in the construction industry in the Parliamentary discussions are mainly drawn from the examples in the building and/or infrastructure work which is affixed to land, that does not necessarily exclude any construction, installation,
D alteration works done with respect to the gas,oil and petrochemical works. To restrict the application of the CIPAA to examples referred to in Parliamentary debates would be to unduly restrict the application of the CIPAA to examples that our lawmakers could think of and failing in the process to follow the cardinal rule of interpreting the ordinary and natural meaning of those words
E used in the definition section.

[61] I have no quarrel with the wisdom expressed by the learned authors Chow Kok Fong, Lim Chong Fong and Oon Chee Kheng of *Adjudication of Construction Payment Disputes in Malaysia* (Lexis Nexis) in the following
F passage in the context of excluding ship-building contracts from the CIPAA at para 4.12 at p 30:

> *Construction works, per se, are annexed to the real property and when completed form part of the real property*. It follows that any component or material which is
G incorporated as part of the works becomes part of the real property, in contrast with chattels which retain their character as personal property. *For this reason it is considered that the Act would not apply to, for example, a shipbuilding contract notwithstanding that these share many characteristics with that of a construction contract.* (Emphasis added.)

H

[62] I would say 'ship building' contract is excluded because it does not come under (a) the structures which are mainly buildings on earth, expressed as below or above ground level; or (b) the infrastructures as in road, harbour works, railway, cableway, canal or aerodrome for example.

I

[63] It is more in the form of a chattel but the fact that it may be a chattel is not conclusive that it is not construction work if the chattel is now being converted for use in the 'oil and gas industry'.

[64] My attention was also drawn by learned counsel for the respondent to an article published by Lim Chong Fong in the KLRCA Newsletter Jul–Dec 2012 at p 9 (now judge of the High Court of Malaya) entitled *The Legal Implication of CIPAA*, wherein he opined as follows:

> It is unclear as to whether ship building such as a FPSO vessel common in the oil & gas industry is encompassed by the CIPAA. Again, it is submitted that the CIPAA does not apply because *the genus of the definition of construction work relates to fixtures whereas the FPSO is a chattel.* (Emphasis added.)

[65] It is my unfortunate lot to have to agree to disagree with my learned brother Justice Lim Chong Fong on this issue for the reasons given above.

[66] Learned counsel for the respondent was further fortified in his view that work done on all chattels have to be excluded when he drew deep from the definition of 'building' under s 2 of the CIDB (Amendment) Act 2011 where building is described as follows:

> any permanent or temporary building or *structure* including any house, hut, shed or roofed enclosure, whether used for the purpose of *human habitation or otherwise*, and also any wall, roof, fence, *platform*, staging, gate, post, pillar, paling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage, road or bridge, or any *structure support* or foundation connected to the foregoing and *any other erection,* as the Minister may, by order published in the *Gazette*, declare to be a building; (Emphasis added.)

[67] He highlighted that what can be noted is that all of the buildings or structures described are clearly affixed and immovable including docks, wharf, pier, jetty and bridge, whether on-shore or off-shore.

[68] I would however say that the words emphasised in the definition of building is broad enough to cover the construction, installation or alteration of a platform out in the sea with respect to gas, oil and petrochemical work. Otherwise one would be confining gas, oil and petrochemical works to factories processing such works or pipes carrying gas, oil and petrochemical or tanks build for such purpose but then that would have already been covered under any building, structure under (a) or pipeline under (e) of the definition of 'construction work' in s 4 of the CIPAA.

[69] Surely the legislature did not intend an overlap in definition and that any gas,oil and petrochemical works must be broader than works envisaged in the other definitions under (a) and (e) bearing in mind that the 'oil and gas industry' would peculiarly and particularly involve activities that are off-shore in the nature of exploration, exploiting, drilling, extracting from the seabed, storing and offloading as are typically the activities of a FPSO vessel or platform. It would not be presumptuous to say that Parliament must have in

mind that some of these works are done on board rigs, or even vessels or even ships modified, altered or converted for such a purpose

[70] It is a case consistent with Parliament's intention to extend the CIPAA to the 'oil and gas' industry as well, that the functional purpose served by structures such as a FPSO vessel or platform would be the determinative factor rather than is it a chattel or a building with affixation to the earth whether below, on ground or above. Whilst the definition of building is with respect to form and structure, the definition for oil, gas and petrochemical works is with respect to function or functional purpose.

[71] He saw something of a revelatory significance in that the definition of 'building' was not previously in the CIDB Act 1994 and the purpose of the word 'building' in the CIDB (Amendment) Act 2011 appears to be for the purposes of imposing statutory duties on contractors under the new ss 34B–34E. Of particular note is s 34C(1)(a) which provides that the CIDB may engage a qualified person or specialist to carry out investigations and test and advise the CIDB on all matters relating to the safety of the *'building in respect of which construction works* are being carried out or have been carried out'.

[72] He then went on to conclude that under the scheme of the CIDB Act, 'construction works' are always in respect of buildings (which by definition includes structures) and this is exemplified by the fact that something as important as safety is confined to buildings because under the construction industry and consequently the CIDB, it is only works to buildings, being real property of an immovable nature, that properly qualify as construction works.

[73] I must interject here to state that there is no need to restrict and confine CIDB's safety concerns to that of buildings or structures on-shore. As defined these structures need not be for human habitation. Granted there will be a need for human persons to be there at the structures be they on-shore or off-shore to monitor, supervise and manage the gas, oil and petrochemical work that is being carried out. In fact under the Factories and Machinery Act 1967, a factory would include 'premises' defined in s 3 to include any building, place, or *floating structure.*

[74] Learned counsel further pressed home the point that a FPSO is not a building or structure as defined by making reference to a paper entitled 'An Overview of the Shipbuilding Industry in Malaysia' presented by Datuk Seri Ahmad Ramli Mohd Nor, Chairman, Association of Marine Industries of Malaysia and Nazery Khalid, a senior fellow of the Maritime Institute of Malaysia presented at the 5th Asia Maritime Conference 2008 at Kuala Lumpur on 24 June 2008 which clearly acknowledges FPSOs to be ships fabricated at shipyards (not construction sites) as follows:

> Focusing on servicing the oil and gas sector and related industries, it has can accommodate the drydocking of vessels of up to 450,000 DWT and has a shiplift system capable of handling ships up to 50,000 DWT. *It is also capable of designing, fabricating, installing and commissioning such as Floating Production Storage Offloading (FPSO) vessels and Floating Storage Offloading (FSO) vessels*. (Emphasis added.)

[75] If I may say here that the place where a FPSO vessel is prefabricated is not important as in whether it be in a shipyard or a steelyard. What is important is the purpose for which the FPSO vessel is put to use. If it is designed for the shipping industry then it does not fall within the CIPAA but here, as it is being converted, modified, altered and designed for the oil and gas industry, then it falls neatly and nicely under 'construction work' being defined as such work done in any 'gas, oil and petrochemical work'.

[76] In further support of his stand that ships such as the FPSO vessel does not come within the construction industry he referred to the fact that the ship building and repair industry in Malaysia is governed by the Ministry of International Trade and Industry ('MITI') with the licenses for ship building issued by MITI. In short, he concluded, CIDB has no jurisdiction or authority over ships and consequently FPSOs as they do not come within the construction industry.

[77] I am inclined to agree with learned counsel for the claimant that parking the registration of ships under MITI is partly because of the need to collect date on international trade. However as CIDB is now tasked with registration of contractors for the 'gas and petrochemical' works, the fact that registration of a FPSO vessel is under MITI is immaterial as one looks at the nature of work carried out. There is also nothing wrong or unusual to have a chattel registered under MITI but work carried out on the chattel must be executed by contractors registered under CIDB.

[78] According to learned counsel for the respondent, yet another reason why a ship-building contract cannot be considered as a construction contract is derived from the fact that a ship building contract is essentially a 'supply of goods' contract. This was loosely defined in the case of *NGV Tech Sdn Bhd & Anor v Kerajaan Malaysia* [2016] MLJU 439 at para 16, where Azizah J stated that:

> From the recital of the agreement, the subject matter of the contract is the purchase of the vessels by the defendant, which was to be built by the first plaintiff. As the agreement is for the purchase of the vessels, under s 2 of the Sale of Goods Act 1957 ('the SOGA 1957'), vessel falls within the meaning of 'goods', that is 'every kind of movable property'. The agreement is then subject to the SOGA 1957. This is in line with the case of *Re Blyth Shipbuilding and Dry Dock Company Limited* [1926] 1 Ch 494 where it was held that a shipbuilding contract to be 'unquestionably a contract

for the sale of future goods within the meaning of the Sale of Goods Act 1893.

[79] I have no problem with the above position of the law as here we are not talking about the sale of a chattel but work that is being done on the chattel and the supply of valves to such a work which qualifies to come under the meaning of 'construction work' as it is any 'gas, oil and petrochemical work'. Such an interpretation would be promoting the purpose of the Act which Parliament had in mind to extend it to the oil and gas industry when other jurisdictions have expressly excluded it.

[80] It is also a reflection on the importance of this oil and gas industry to our economy.

PRONOUNCEMENT

[81] I had therefore dismissed the two OS filed for setting aside the adjudication decision and correspondingly I had allowed the OS for enforcement. As stated earlier, other than challenging the jurisdiction of the adjudicator to hear the dispute, the respondent had not raised any valid defence to the claimant's claims and indeed both the adjudicators had found that the claimant had proved its payment claims.

[82] Being a novel point both counsel agreed that this court may exercise its discretion and make no order as to costs.

[83] I agreed and I made no order as to cost.

Claimant's application allowed; respondent's application dismissed.

Reported by Dzulqarnain Ab Fatar